January 25, 2012

Nancy Sutley, Chair
Council on Environmental Quality
The White House
Washington, DC 20500

Dear Chairwoman Sutley:

The American Forest Resource Council (AFRC) appreciates the opportunity to provide recommendations on improving the NEPA process.

The Council on Environmental Quality (CEQ) regulations implementing the National Environmental Policy Act (NEPA) have slowed the federal land management agency decision-making process to a crawl, adding little value to decisions but swelling the cost of the process. Unfortunately, your December memorandum regarding "Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act" does nothing to really address changes that could improve the process other than to cite sections of the existing CEQ regulations that have not been amended in over three decades.

AFRC represents wood products manufacturers and forest landowners that are affected by management of federal forest land. AFRC wants to maintain healthy federal forests, particularly those adjacent to well managed private forests so they are not threatened by insects, disease, and wildfire originating on federal forests. AFRC also supports federal timber sales to improve forest health and to supply raw material for its member's mills that provide increasingly rare manufacturing jobs. AFRC and its members regularly participate in the NEPA process including the adoption of regulations, preparation of forest plans, and implementation of projects such as timber sales. AFRC has been an intervenor in numerous NEPA lawsuits defending NEPA compliance of land managing agencies, most often the Forest Service and Bureau of Land Management.

CEQ should build on success

An example of where CEQ has provided tangible help in reducing an agency's costs and analytical burden is direction about what is required to assess past cumulative effects. CEQ issued a "guidance" letter explaining that an agency can rely on existing environmental conditions as a measure of past cumulative effects. The guidance was in response to several Ninth Circuit decisions that held that an agency had to enumerate every past action, the day and

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hour it occurred, its exact location, the type of silvicultural treatment applied, and logging system used. On June 24, 2005, CEQ issued what it described as "Guidance on the Consideration of Past Actions in Cumulative Effects Analysis." The case most directly approving the CEQ approach was League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Service, 549 F.3d 1211, 1218 (9th Cir. 2008):

> LOWD points to no evidence to suggest that CEQ's interpretation does not reflect the agency's fair and considered judgment on the cumulative effects issue, and CEQ's interpretation is just as plausible as LOWD's position that analysis of "past effects" requires evaluation of discrete past events. The CEQ memorandum is therefore entitled to [ ] deference and, as a result, we hold that the Forest Service may aggregate its cumulative effects analysis pursuant to 40 C.F.R. § 1508.7.

To reduce an agency's analytical burden, CEQ can issue additional guidance letters for problem areas such as the inability to take advantage of tiering and how to consider science without writing a PhD dissertation. Of course if "guidance" will impose on agencies new, confusing, or burdensome requirements, then CEQ should resist the urge to weigh in. An example of unhelpful guidance that complicates, rather than relieves, the agency analytical burden is CEQ's lengthy February 18, 2010 "Draft NEPA guidance on consideration of the effects of climate change and greenhouse gas emissions."

Its déjà vu all over again -

Some agencies repeat the same type of project that has well recognized but minimal environmental impacts and should not have to repeat the environmental analysis each time that type of project is conducted. Categorical exclusions are not the answer, but CEQ should provide by regulation, a streamlined mechanism for approval of projects commonly repeated. For example, for nearly two decades, the Forest Service and Bureau of Land Management (BLM) have almost exclusively commercial thinned forests of less than 80 years old under the Northwest Forest Plan even though the Plan called for regeneration harvest of old growth. Although they have two decades of experience, the environmental analysis for the thinning must be repeated over and over again. The Supreme Court recognized that when an action is common and not a novel project with unknown environmental consequences, it is easier to conclude that a "hard look" at the consequences has occurred under NEPA. Winter v. Natural Resources Defense Council, 129 S. Ct. 365 (2008). The Supreme Court explained:

> We also find it pertinent that this is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment. . . . Part of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures. Here, in contrast, the plaintiffs are seeking to enjoin-or substantially restrict-training exercises that have been taking place . . . for the last 40 years.

Id. at 376 (emphasis added).

CEQ should build on the principle set forth in Winter by amending its regulations to clearly provide that actions with known environmental effects that are conducted frequently, but do not qualify as categorical exclusions, shall not require as detailed environmental analysis as new, untested actions.

The opportunity of "Tiering" really is a figment of CEQ's imagination -

Tiering is an efficiency concept in the CEQ regulations encouraging the environmental analysis for a broader programmatic EIS to be used to simplify and streamline the analysis for a project that implements the program. Unfortunately, court decisions have precluded the Forest Service from tiering to the most relevant EIS, the forest plan, and essentially have required full blown, zero-based analysis of projects. It is questionable whether programmatic statements are of any use if they can't be used to make project level NEPA analysis less costly and time consuming. The CEQ regulation 40 C.F.R. 1508.28 defines tiering:

> "Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.

The CEQ regulation further explains:

> Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review. Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action.

40 C.F.R. 1502.20.

It has been difficult for the Forest Service to tier projects to Forest Plan environmental analysis. In Blue Mtn. Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998) the Ninth Circuit held that:

> We also reject the Forest Service's argument that it need not prepare an EIS for the Big Tower project or any of the other proposed sales because these projects may be "tiered" to the Umatilla National Forest Plan EIS and to the other EAs pursuant to federal regulations. "Tiering refers to the coverage of general matters in broader environmental impact statements ... with subsequent narrower statements or environmental analyses." 40 C.F.R. § 1508.28. Nothing in the tiering regulations suggests that the existence of a

> programmatic EIS for a forest plan obviates the need for any future project-specific EIS, without regard to the nature or magnitude of a project.

See also Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800 (9th Cir. 1999) (Forest Service could not tier EIS to report on river watershed, whereby report would be incorporated by reference in EIS, since EIS could only be tiered to a prior EIS, and, in any event, report did not fill all gaps in EIS).

The BLM and Forest Service were also defeated in their effort to use analysis in forest plans in Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, 387 F.3d 989 (9th Cir. 2004) and Muckleshoot Indian Tribe v. United States Forest Service, 177 F.3d 800 (9th Cir.1999).

In KS Wild, the court rejected BLM's attempt to tier a timber sale to the EIS prepared for the Medford District's Regional Management Plan ("RMP-EIS") and the Little Butte Creek Watershed Analysis. The Court said:

> Tiering to the RMP-EIS cannot save the EAs. We accept the BLM's argument that the RMP-EIS contains general statements about the cumulative effects of logging across the Medford District. And the EAs at issue here contain general statements about the cumulative effects of logging in the SFLBC (South Fork Little Big Creek) watershed. What is missing in the documentation, however, is any specific information about the cumulative effects. Neither in the RMP-EIS nor in the EAs does the agency reveal the incremental impact that can be expected on the SFLBC watershed as a result of each of these four successive timber sales.

KS Wild, 387 F.3d at 998.

In Muckleshoot, the Forest Service attempted to save the EIS for a land exchange by tiering it to the Forest Service's programmatic Land and Resource Management Plan ("LRMP"). The Court reviewed the LRMP and found that while it did discuss the land exchange program in general and mentioned the particular exchange at issue by name, it could not save the challenged EIS because it did not "account for the specific impacts of the Exchange." Muckleshoot, 177 F.3d at 809-10.

The bottom line is that agencies think that tiering can permit them to use environmental analysis in a prior programmatic EIS. At least in the Ninth Circuit, that is not the case.

Recommendation: Direction from CEQ strengthening an agency's ability to tier would be helpful.

Incorporation by reference -

Courts often confuse tiering and incorporation by reference, holding that an agency has illegally tiered to a document, when all that the agency was trying to do was incorporate the document by reference. For example, the Forest Service reliance on carefully prepared

watershed analysis has been invalidated. See League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Service, 549 F.3d 1211, 1219 (9th Cir. 2008) ("The problem with the Forest Service's approach, however, is that the FSEIS cannot "tier" to the Watershed Analysis to analyze sufficiently the cumulative effects of the Project."); Oregon Natural Resources Council v. U.S. Bureau of Land Management, 470 F.3d 818 (9th Cir. 2006) ("the Watershed Analysis is not a NEPA document and therefore the EA cannot tier to it."). The CEQ guidelines specifically allow for incorporation by reference and instruct agencies to use this method "when the effect will be to cut down on bulk without impeding agency and public review of the action." 40 C.F.R. § 1502.21. Material may not be incorporated by reference when "it is [not] reasonably available for inspection by potentially interested persons" or when it consists of "[m]aterial based on proprietary data which is itself not available for review and comment[.]" Id. Unfortunately, the Ninth Circuit has held in Center for Biological Diversity v. U.S. Forest Service, 349 F.3d 1157 (9th Cir. 2003) that opposing scientific views must be discussed in the text of the EIS rather than in an appendix.

Recommendation: CEQ should clarify that incorporating a document such as watershed analysis into the NEPA analysis is not impermissible tiering to a non-NEPA document but is permissible incorporation by reference and make it clear that an agency may discuss opposing viewpoints in an appendix such as the response to public comment.

Mission Brush and Science -

CEQ should address the burden that agencies face in having to address ever changing uncertain science and should take advantage of court decisions holding that agencies do not have to use the best scientific methodology. In particular, an en banc panel of the Ninth Circuit in Lands Council v. McNair, 537 F.3d 981 (9th Cir 2010) (en banc) involving the Mission Brush Project held that:

> [N]one of NEPA's statutory provisions or regulations requires the Forest Service to affirmatively present every uncertainty in its EIS. Thus, we hold that to the extent our case law suggests that a NEPA violation occurs every time the Forest Service does not affirmatively address an uncertainty in the EIS, we have erred. *See Espy,* 998 F.2d at 704; *see also Ecology Ctr.,* 430 F.3d at 1065. After all, to require the Forest Service to affirmatively present every uncertainty in its EIS would be an onerous requirement, given that experts in every scientific field routinely disagree; such a requirement might inadvertently prevent the Forest Service from acting due to the burden it would impose.

Id. at 1001.

In addition, the McNair court emphasized that: "NEPA does not require us to decide whether an [EIS] is based on the best scientific methodology available." McNair, 537 F.3d at 1003.

Recommendation: It would be extremely helpful if CEQ made clear that to satisfy NEPA an agency does not have to address all scientific uncertainty and that an agency does not have to use the "best" scientific methodology.

EA requirements and EIS requirements are not the same

Some cases have concluded that certain requirements for preparation of an EIS do not apply to preparation of an EA, noting that the CEQ regulations are not clear. See e.g. Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corps of Engineers, 524 F.3d 938, 952 (9th Cir. 2008) (Finding no requirement for public comment on EAs and that "requiring the circulation of a draft EA in every case would apply a level of particularity to the EA process that is foreign to the regulations.")

Recommendation: CEQ should issue clarifying guidance that CEQ regulation requirements applicable to preparation of an EIS do not apply to an EA. Such guidance would certainly make it easier for an agency to prepare an EA.

In conclusion, AFRC encourages CEQ to consider amending its 30 year old regulations to truly reduce the costly and time consuming analytical process under NEPA and build on favorable court opinions that hold that every last scientific report and every environmental uncertainty need not be examined in the NEPA documents. Attached to these comments are additional suggestions for fixing NEPA procedures and direction.

Sincerely,

/s/ Scott Horngren

Scott Horngren

RECOMMENDATIONS FOR REASONABLE REFORM OF THE COUNCIL ON ENVIRONMENTAL QUALITY (CEQ) REGULATIONS IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT

Introduction and Summary

The National Environmental Policy Act ("NEPA") is a simple statute. The implementing provision is a single paragraph that directs agencies to prepare a "detailed statement" for major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2) (C). In contrast, the Council on Environmental Quality ("CEQ") regulations implementing NEPA span over 25 pages of the Code of Federal Regulations. 40 C.F.R. §§ 1500-1508. Although they have no authority to do so, Courts have added their own requirements that are found neither in the NEPA statute nor the CEQ regulations. The Justice Department has successfully challenged the court imposed requirements in some cases such as the requirement to prepare a "mitigation plan" as part of the environmental analysis Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989). However, some of the judicially imposed requirements remain unchallenged and court decisions continue to put an increasingly burdensome gloss on the CEQ regulations.

Although the CEQ cannot change court decisions, there is a critical need to simplify and streamline the CEQ procedures to implement federal agency projects more promptly and less expensively while at the same time reducing the risks of courts delaying thoroughly analyzed projects based on deficiencies in the NEPA documents. NEPA has become so unworkable for land management agencies that there has been a trend to avoid NEPA analysis by expanding the use of categorical exclusions. This should be an indication that the conventional NEPA process under the CEQ regulations as it has evolved through judicial interpretation is in need of repair.

The problem is not new. In a 1978 Executive Order, the CEQ was directed to adopt regulations implementing procedural provisions of NEPA. E.O.-11991 (1978). CEQ was directed to "make the environmental impact statement process more useful to decision makers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives." See 51 Fed. Reg. 15618, 15619 (April 25, 1986). After three decades of experience with the CEQ regulations and court interpretations, the NEPA process has become more cumbersome and increasingly geared towards the collection of extraneous information than when the President ordered the CEQ to promulgate the regulations in 1978.

The CEQ regulations require environmental documents to study all other actions that may be "connected" to the proposed action; to analyze a large geographic range encompassing such connected actions; and to consider all "cumulative effects" of past, present and reasonably foreseeable future actions by private, state, and federal entities - without providing clear guidance for deciding where and when the analysis should stop. The CEQ regulations also force agencies to rewrite their NEPA documents by requiring a supplemental EIS whenever there is significant new information or circumstances "bearing on the proposed action" even if it is unrelated to the expected environmental impacts of the approved project. Court decisions require preparation of supplemental environmental assessments ("EAs") although the requirement is not found in the regulation.

Most of the NEP A cases that have flooded the courts in recent years are based on violations of the CEQ regulations. Thus, while NEPA has accomplished a worthwhile goal of focusing agency attention on environmental values, in many instances it has created an arduous decision-making process, with difficult compliance hurdles, requiring years of analysis and document preparation and millions of dollars of staff time. The lengthy preparation time makes the documents increasingly vulnerable to the moving target of rapidly developing new information. Many worthwhile and environmentally-friendly agency projects are delayed for years and experience large cost increases solely because of required NEPA procedures that ultimately add nothing of value to a project's design or utility. The CEQ needs to streamline and modernize key parts of its regulations and clarify the analytical requirements for agency projects.

Amendment of the regulation should address at least the following issues:

1. Clarify that the amount and type of data and information needed in an EIS is only that which is essential for a reasoned choice among alternatives.

2. Revise or delete the regulations governing cumulative effects.

3. Revise the regulations to clarify that an expansive discussion of differing "scientific" opinion is not required for the increasingly numerous issues where there is no unanimity of opinion.

4. Narrowly define "new information" that requires a supplemental EIS.

5. Clarify that a supplement EA is not required.

6. Clarify that important material may be incorporated by reference in an appendix to an EIS or an EA.

7. Create a new category of significant action called "significant action needing urgent review" that can proceed under streamlined procedures.

8. Explicitly provide that an agency can examine a no-action and an action alternative in an environmental document.

Precedent for Reform of the CEO Regulations

CEQ has previously clarified its regulations to respond to the impractical, expansive judicial interpretation of the breadth of information and analysis required by the CEQ regulations. For example, at one time the CEQ regulations required that when there were gaps in relevant information or scientific uncertainty about significant environmental effects, the agency had to either obtain the information if it was essential to a reasoned choice and the cost of obtaining it was not exorbitant, or include a worst case analysis. Specifically, the regulation required that if the agency were to proceed with the action "it shall include a worst case analysis and an indication of the probability or improbability of its occurrence." 40 C.F.R. § 1502.22 (1982). Because of limited agency budgets, the agencies normally chose not to conduct a worst case analysis. However, the courts increasingly invalidated agency projects because the judges agreed with environmental plaintiffs that a worst case analysis was required. Save Our Ecosystems v. Clark, 747 F.2d 1240,1244 (9th Cir. 1984); Southern Oregon Citizens Against Toxic Sprays, Inc., v. Clark, 720 F.2d 1475 (9th Cir. 1983). In 1986, the CEQ deleted the requirement for a worst case analysis because the "requirement is an unproductive and ineffective method . . . which can breed endless hypotheses and speculation." 51 Fed. Reg. 15618, 15620 (April 25, 1986). Thus, the CEQ has acted decisively in the past to amend its regulations to modify ineffective, unimportant analysis requirements. The time has come after three decades to do so again and modernize the regulations.

Clarify that the Amount and Type of Data and Information Needed in an EIS is Only that Which is Essential for a Reasoned Choice Among Alternatives

1. The Problem and Examples.

Courts have unrealistically expanded the data and information requirements for environmental impact statements. While CEQ eliminated the worst case analysis requirement of the regulation, there still are "gaps in relevant information of scientific uncertainty" as described in the current regulation, that agencies struggle to address in environmental documents and for which the courts impose unattainable analysis requirements. 40 C.F.R. § 1502.22 (2004). The CEQ regulations address "incomplete and unavailable" information and conclude that that information must be collected only if it "is essential to a reasoned choice among alternatives." 40 C.F.R. § 1502.22. There is no limit addressing how much "available" information must be included in an EIS. Ninth Circuit cases have case required the EIS to include extreme detail on all past actions in the watershed because the information was available and imposed upon the Forest Service and BLM detailed analysis requirements of private land conditions and activities. The federal agencies have no authority to enter private land or to compel private landowners to provide information on the condition of their land or their management practices. However, the courts are concluding that the failure to provide detailed information about actions on private lands renders an EIS inadequate. This information collection demand arguably extends beyond what is required by NEPA, particularly after the Supreme Court's decision in Department of Transportation v. Public Citizen, 124 S.Ct. 2204 (2004). Whether its information about conditions and actions on federal or private land, CEQ needs to emphasize that the information need not be included in an EIS unless it is essential for the decision maker to make a reasoned choice among alternatives.

2. Recommendations.

CEQ needs to confront the excessive information demands imposed on agencies by the courts. It should make no difference whether information is "available" or "incomplete or unavailable." The threshold question governing whether information must be included in an EIS is whether the information "is essential for the agency to make a reasoned choice among alternatives," and 40 C.F.R. § 1502.22 should be amended to include this qualification. The world is full of available resource information but there is only a truly limited amount that is essential to a reasoned choice between alternative courses of action.

Delete or Rewrite the Regulations Governing Cumulative Effects

1. The Problem and Examples.

The CEQ regulations define cumulative impacts as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. In League f Wilderness Defenders v. U.S. Forest Service, Civ. No. 04-488-HA, 2004 WL 2642705 (D. Or. Nov. 19, 2004) (Flagtail Project), the court held that the Forest Service cumulative effects analysis had to include an analysis of where future wildfires will burn and how specifically they will be controlled, an exercise in crystal ball gazing which had no bearing on the effects of the current action to salvage dead trees.

2. Recommendations.

NEPA does not mention the term cumulative impact. The CEQ regulations set forth the required content of an EIS which specifically identifies direct effects and indirect effects and does not use the term cumulative impacts. 40 C.F.R. § 1502.16(a), (b). CEQ should delete from its regulations the requirement for consideration of cumulative impacts. 40 C.F.R. §§ 1508.7 and 1508.8. The elimination of "worst case analysis" from the regulations did not destroy the environment or the quality of environmental analysis, as its defenders predicted. Nor will a decision that agencies can limit their analysis to the direct and indirect effects of the proposed action without speculating on cumulative effects. Cumulative effects analysis is as difficult for agencies to perform, and as wide open to judicial second-guessing, as was worst-case analysis. The difficulty is due in part to how CEQ defines cumulative impact. If an effect of the action is added to a past, present, or future effect, every effect is a cumulative effect.

If the concept of cumulative impacts remains in the regulation, then:

- CEQ should revise its regulations to clarify that past effects can be accounted for in cumulative effects analysis through assessing the current environmental conditions or the environmental baseline in the project area consistent with its June 24, 2005 CEQ memorandum on the topic. This same approach of starting with the baseline is used in the Endangered Species Act Section 7 consultation regulations.

- CEQ should modify the cumulative impact definition (40 C.F.R. §1508.7) to clarify that if an agency has no statutory authority over a particular action, then the effects of the action are not considered effects of the agency project and that the incremental impact of the action is not a cumulative impact attributable to the agency project. Dept. of Transp. v. Public Citizen, 124 S.Ct. 2204, 2216-17 (2004).

- CEQ should modify the cumulative impact definition (40 C.F.R. §1508.7) to provide that cumulative impacts encompass impacts from concrete "proposed actions" rather than amorphous "reasonably foreseeable" future actions. Is it really reasonably foreseeable to account for impacts from an action that has not been funded or proposed?

- If the amorphous term reasonably foreseeable is not replaced, then CEQ should qualify the term with a time frame such as "reasonably foreseeable within five years."

- CEQ should modify the scope of impacts to be considered in an EIS (40 C.F.R.§ 1508.25), to provide that agency "can" or "may wish to" consider cumulative actions in the same impact statement which would be consistent with the discretionary language for "similar actions."

Revise the Regulations to Clarify that an Expansive Discussion of Differing "Scientific" Opinion is not Required for the Increasingly Numerous Issues Where There Is No Unanimity of Opinion

1. The Problem and Examples.

The CEQ regulations require that "agencies shall ensure the professional integrity, including scientific integrity, of discussions and analyses in environmental impact statements." 40 C.F.R. §1502.24. Furthermore, when information is incomplete or unavailable, the agency is compelled to summarize existing credible scientific evidence and assess impacts "based upon theoretical approaches or research methods generally accepted in the scientific community." 50 C.F.R. § 1502.22(b)(1). Unfortunately, in matters of resource use, there often are no "generally accepted theoretical or scientific approaches" but a number of competing policy preferences advocated by scientists. The CEQ requirement to ensure the "scientific integrity" of an EIS has often been used by courts to find an EIS adequate only if it is a treatise on resource science. For example, the district court in League of Wilderness Defenders v. U.S. Forest Service, Civ. No. 04-488-HA 2004 WL 2642705 (D. Or. Nov. 19, 2004) (Flagtail), held that the EIS was inadequate because it did not discuss the scientific opinion and publications provided by plaintiffs' attorney during litigation. In particular, the Court held that the Forest Service must provide a reasoned discussion of major scientific objections to the proposed action of removing large diameter, fire killed, trees to reduce future fire risk and that the Forest Service discussion of a single science report objecting to removal of large diameter trees was not enough. 2004 WL 2642705 at p*15. NEPA does not require an EIS to be a scientific treatise. Given the scientific disagreement on almost every facet of public lands management, an EIS can never comprehensively discuss all differing scientific opinion.

2. Recommendations.

- Just because a scientist or a group of scientists advocate a particular policy approach, does not mean that the EIS must give more credence to the comments of those scientists than to any other member of the public. The CEQ regulations already require the preparation of an EIS rather than an EA when "the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4). Once an agency decides to prepare an EIS, the degree and detail of the discussion of various scientific methods and differences in scientific opinion, should only be what is essential to make a reasoned choice among alternatives.

- As to scientific opinion, the same requirements that apply to the agency should apply equally to commenters - that there is some proof that the information is science rather than just opinion before the agencies have a duty to respond in the environmental document.

- Define what constitutes "credible scientific evidence" in 40 C.F.R. § 1502.22.

Narrowly define "new information" that requires a supplemental EIS.

1. The Problem and Examples.

The evolution of science and the abundance of "scientific" opinion and reports are overwhelming agencies with new information. The CEQ regulations require the preparation of a supplemental EIS when there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c) (1) (2) (emphasis added).

2. Recommendation.

The CEQ should amend the regulations to more narrowly define "new information" which triggers the need for a supplemental EIS so that not every scientific report or agency study triggers the preparation of a supplemental environmental document. First, new scientific reports should not trigger a supplement unless the science meets the standard for reliability articulated by the Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Second, a supplemental environmental document should not be required unless the new information is relevant to environmental concerns, the proposed action, and its impacts. Under the CEQ regulation as currently written, a supplement is required even if the new information has no bearing on the impacts for the proposed action. The Supreme Court in Metropolitan Edison v. People Against Nuclear Energy, 460 U.S. 766 (1983), emphasized that NEPA concerns impacts on the physical environment, thus if the information is not related to the impacts of the proposed action, a supplement should never be required. Finally, the regulations should state that the agency can consider the new information in whatever form it desires and that its consideration of the significance of the new information does not require an environmental assessment, alternatives, or public comment.

Clarify that a Supplemental EA is not Required.

1. The Problem and Examples.

Even though supplemental EAs are not specifically required by the CEQ regulations, agencies have prepared supplements to EAs. Because EAs are not required by the statute and EA supplements are not required by the CEQ regulations, it makes sense to clarify that there is no requirement for a supplemental EA. If the action covered by the EA is not significant and new information or changed circumstances do not make the action significant, then there is no reason for a supplemental EA.

2. Recommendations.

The CEQ could clarify that supplements to EAs are not required. The CEQ regulations require supplements to EISs but are silent about whether supplemental EAs are required. The significance threshold must be crossed to prepare an EIS or supplemental EIS. An insignificant project represented by an EA remains insignificant and should never be "supplemented." If a major federal action may have a significant effect on the environment, an EIS is required.

Clarify that Important Material May be Incorporated by Reference in an Appendix to an EIS or an EA.

1. The Problem and Examples.

The CEQ regulations provide for the use of an EIS appendix but make no reference to an appendix for an environmental assessment. 40 C.F.R. § 1502.18(c). The agency's ability to meet its judicially imposed, increasingly burdensome, duty to include more information in the EIS is hindered by court decisions that an appendix cannot be used as an aid to address any issue of substance. For example, agencies use numerous models often with a description of model limitations which are commonly placed in an appendix or elsewhere in the administrative record. The Court in Blue Mountain Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998), held that the administrative record is irrelevant to supporting conclusions in an environmental assessment. In Oregon Natural Resources Council v. Brong, 2004 WL 2554575 (D. Or. Nov. 8, 2004) (Timbered Rock), the district court held that the limitations for an analysis tool called DecAID, were found only in an appendix and discussing the limitations in an appendix was an "impermissible location for such an important disclosure."

2. Recommendations.

CEQ must clarify that an appendix is an integral part of an EIS and that an agency can incorporate material using an appendix even if the material is important, because the appendix itself is part of the EIS and should "normally be analytic and relevant to the decision to be made." 40 C.F.R. § 1502.18(c). The appendix must be considered in judging the adequacy of the environmental analysis. The rule also should be modified so the same principles governing the use of an appendix are applied to environmental assessments.

Create a New Category of Significant Action Called "Significant Action Needing Urgent Review" that Can Proceed Under Streamlined Procedures

1. The Problem and Examples.

Agency emergencies can justify alternative NEPA procedures under the current CEQ regulations only in very narrow circumstances. 40 C.F.R. § 1506.11. On average there have been only two actions a year where alternative arrangements have been allowed. Yet throughout the country there are far more than two emergency agency actions needing prompt NEPA approval.

2. Recommendation.

CEQ should create a new category of "significant actions needing urgent review" that would allow a NEPA process to be completed in less than six months. This could apply to many actions following natural disasters such as fires, floods, hurricanes, and windstorms, which may not rise to the level of a narrowly defined emergency but still require prompt remedial action. This is particularly needed when valuable government property must be protected or salvaged such as rapidly deteriorating high value timber after a forest fire. Taxpayers will benefit from prompt action to minimize costs of repair or loss of value to government property following catastrophes.

Explicitly Provide that an Agency can Examine a No-Action and an Action Alternative in an Environmental Document

1. The Problem and Examples.

The action contemplated by an agency often has no alternative given the circumstances and narrow scope of the action. Agencies should have the flexibility to examine a single action alternative so long as the environmental effects of the action alternative are adequately disclosed.

2. Recommendation.

The CEQ regulations should be modified to explicitly permit an agency to consider a no-action and a single action alternative in an environmental document.